IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 190 of 2002

For Approval and Signature:

HONOURABLE THE CHIEF JUSTICE Y.R.MEENA

HONOURABLE MR.JUSTICE A.S.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AKHIL GUJARAT ADIVASI VIDYARTHI MANDAL
Versus
SECRETARY & others

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Appearance :

Mr. Jitendra Malkan for the petitioner

Ms. Manisha L. Shah, Assistant Government Pleader for the respondents

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CORAM : HONOURABLE THE CHIEF JUSTICE Y.R.MEENA

and

HONOURABLE MR.JUSTICE A.S.DAVE

Date : 19/02/2007

ORAL JUDGMENT
(Per : HONOURABLE THE CHIEF JUSTICE Y.R.MEENA)

1 By this petition in the nature of public interest litigation, following prayers are made:

"[A] Issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside the impugned notification dated 23rd November 2001 as being ultra vires the Constitution of India.

[B] Issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside the election in the office of Sarpanch in six village panchayats viz (i) Bhalod (ii) Indore (iii) Nana Vasana (iv) Rundh (v) Tersali (vi) Totidara pursuant to the notification dated 26.11.2001."

2 The case of the petitioner is that, while applying the Gujarat Panchayats Act, 1993 in the scheduled area, a notification has been issued by His Excellency the Governor of Gujarat in exercise of powers conferred by sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India. The notification, which has been issued in the

application of the provisions of the Act of 1993 referred to in column 2 of the table annexed to the notification, the modification, which has been shown, is not justified and the Governor has no power to issue such notification.

3 Replying to this allegation, the respondents have justified the notification as under:

> "4. At the outset it is submitted that sub paragraph 5(1) of paragraph 5 of the 5th Schedule to the Constitution of India provides that notwithstanding anything mentioned in the Constitution the Governor of any State may by public Notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to scheduled area or any part thereof in the State or shall apply to scheduled area or any part thereof in the State subject to such exceptions and modifications as may specify in the notification and any direction under the paragraph may be given so as to have retrospective effect. Thus, the Government is empowered to issue directions to issue public Notification. It is to be noted here that when such power is exercised by the Governor it is not required to consult Tribal Advisory Council and to submit to the Hon'ble President of India for his assent.
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> It is submitted that Central and State Acts have made provisions for reservations of seats and officers in the Panchayats of the scheduled areas for the members of Scheduled Tribes as per the details mentioned hereunder:-

i) 50% seats are reserved for the members of the Scheduled Tribes in the three tier panchayats of the panchayats falling in the scheduled areas.

ii) All offices of the chair persons and sarpanchas are reserved for the members of the scheduled tribes in the three tier panchayats falling in the scheduled areas.

iii) If for any reason an election does not result in the return of any member of scheduled tribes in a taluka panchayat or district panchayat, the State Government may nominate from amongst members belonging to the scheduled tribes who are qualified to be elected such number of members as not to exceed one tenth of the total numbers to be elected in that panchayats.

6. It is submitted that when the State Government actually implemented the provisions of the reserved seats and offices of the sarpanch in the village panchayats of the scheduled areas to the member of the scheduled tribes as stated facing several problems. For instance it has happened in several village panchayats falling in the scheduled areas there are zero percentage population of the members of scheduled tribes hence it has become practically impossible to elect 50% seats and offices of the sarpanch in absence of the population of the members of the scheduled tribes in such village panchayats. Consequently it has become difficult to decide what standard should be adopted for keeping reserved post for the members of the scheduled tribes. Under the circumstances the representations were received by the State Government from political leaders, local members of the Legislative assembly, local social workers, elected representatives of general category against the reservation of the seats and offices of the sarpanch kept in the village panchayats falling in the scheduled areas. Not only that

the petitions were also filed against the reservation of the seats and the offices of the sarpanch before this Hon'ble Court. The situation has arisen in such a manner that there were likely possibility of Group clashes at the villages of the scheduled areas. The State Government found the same a sensitive issue. Hence it had constituted a Cabinet Sub Committee headed by the then Forest and Environment Minister for stating and submitting their recommendations. The Cabinet Sub Committee submitted its report with its recommendations to the Government. After considering such recommendations the Government decided to exclude those village panchayats of the scheduled areas their reservation of seats and offices of sarpanch where the tribal population having less percent and also decided to reduce the reserved seats of the members of the tribes. Hence Notification dated 23/11/2001 has been issued the powers under section 5(1) of the 5th schedule of the Constitution of India.

7. In this background in reply to averments made in the petition it is submitted that the circumstances have been enumerated hereinunder under which while exercising powers conferred under sub paragraph 5 of paragraph 5 of the 5th schedule of the Constitution of India the Governor has issued Notification dated 23/11/2001. As stated hereinabove once the Governor has exercised the powers which flows from the Constitution, hence, it is not obligatory to consult the Tribal Advisory Council for the State. It cannot be, therefore said that it is contrary to the law and spirit of the Article 244(1) or violative of sub paragraph (1) of 5 of 5th schedule to the Constitution of India. The Election Notification issued by Respondent No.2 is in accordance with the Notification dated 23/11/2001. It is denied that the object and effect of the impugned Notification is to wipe

out reservation provided to the members of the scheduled tribes in the offices of sarpanch of village panchayats. As such the sub committee headed by the then Forest and Environment Department submitted its report and recommendations and only after considering its recommendation and having found that there has been less percent population in certain village panchayats falling within the scheduled areas the Notification has been issued. It is the misconception of the petitioner that the impugned notification was issued almost on the eve of the election i.e. just 48 hours before the scheduled date of issuance of election notification by respondent No.2. The applicant has given his own interpretation to the powers given to the Governor under sub para 1 of paragraph 5 of 5th schedule of Constitution of India. It is his own interpretation that since the impugned notification is without consultation of Tribal Advisory Committee and without approval of the President, it did not become law till the date of issuance of election notification by respondent No.2 and hence bad in law. It is also denied that the impugned notification is discriminatory and therefore violative of Article 14 of the Constitution of India inasmuch as impugned notification discriminates to village panchayats in a scheduled area only on the ground of its population."

4 Heard learned counsel for the petitioner.

Learned counsel for the petitioner submits that His Excellency the Governor of Gujarat has no power to make regulations in exercise of the powers under sub-paragraph (1) of paragraph 5 of the Fifth Schedule without consultation with the Tribes Advisory Council as required under

sub-paragraph (5) of paragraph 5.

5. There is no dispute that notification has been issued by His Excellency the Governor of Gujarat in exercise of powers under sub-paragraph (1) of paragraph 5 of the Fifth Schedule of the Constitution of India. Sub-paragraph (1) of paragraph 5 of the Fifth Schedule has nothing to do with the regulation. If we give a plain reading of sub-paragraph (1) of paragraph 5, that relates to power of the Governor to issue notification regarding application or non-application of the Acts in the scheduled areas. That has nothing to do with the regulation. Therefore, power of Governor cannot be denied to issue such notification in the application of the Gujarat Panchayats Act, 1993, in the scheduled areas.

6. In column 2 of the table annexed to the notification, justification has been given that, where the population of the scheduled tribe is less than 25% of the total population of the village panchayat, benefit extended to the scheduled areas of the village panchayats cannot be extended to such village panchayats. The notification has been passed to apply Gujarat Panchayats Act, 1993 with modification referred to in column No.2 of the table, by which a proviso has been inserted in clause (a) of sub-section (5) of section 9 and also a proviso has been added in

clause 8 of sub-section (2) of section 51. The above modification has nexus with the justification given for issuance of the notification in exercise of powers conferred in sub-paragraph (1) of paragraph 5 of the Fifth Schedule of the Constitution of India, and that has nothing to do with framing of any regulation for scheduled areas.

7 Considering the justification given in the reply, we see no substance in this petition.

8 This petition stands dismissed. Rule is discharged.

(Y.R. MEENA, C.J.)

(swamy) (ANANT S. DAVE, J.)